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No. 85-5238

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

MAJOR CRANE, *Petitioner*,
v.
COMMONWEALTH OF KENTUCKY, *Respondent*.

On Writ Of Certiorari To The
Supreme Court Of Kentucky

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In a criminal case, does a state trial court deny a defendant rights guaranteed to him by the Sixth and Fourteenth Amendments when it refuses to permit him to present to the jury the facts relating to the circumstances surrounding the procurement of his confession and the weight to be given them when those same facts have been considered and conclusively determined by the trial judge in his pre-trial determination of the admissibility of the confession?

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OPINIONS BELOW

The Supreme Court of Kentucky affirmed the petitioner's conviction in a published opinion on February 28, 1985. *Crane v. Commonwealth*, Ky., 690 S.W.2d 753 (1985). (Joint Appendix, J.A., 68-78).

No written opinion was rendered by the Circuit Court of Jefferson County, Kentucky. However, that court did make findings of fact and conclusions of law regarding the question presented herein. (J.A. 21-22; Suppression Hearing Transcript, hereafter Supp. TE, 73-76).

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257(3) because, as reflected in the question presented, the petitioner submits that rights guaranteed to him by the Sixth and Fourteenth Amendments have been abrogated.

The Supreme Court of Kentucky affirmed the judgment of conviction on February 28, 1985 (J.A. 68-78) and denied a timely petition for rehearing, filed on behalf of the petitioner on June 13, 1985 (J.A. 79). On August 12, 1985, a timely Petition for a Writ of Certiorari was filed. Sup. Ct. R. 20.4. The Petition for a Writ of Certiorari was granted on December 9, 1985.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves a question of whether the denial of a criminal defendant's attempt to introduce evidence and pursue a line of cross-examination at trial is a denial of his due process right to put on a defense and his Sixth Amendment right to confront witnesses. At trial in this case, the petitioner sought to elicit evidence concerning the circumstances surrounding the taking of his confession "to cast a doubt on its credibility." (J.A. 23, Opening Statement of Defense Counsel). The trial in this case differed from most in that the evidence against the petitioner consisted primarily of his own confession to the police, a taped, out-of-court statement made by his co-defendant, and a taped out-of-court statement made by the petitioner's mother to the police. There was very little physical evidence concerning the crime and, as shown below, none of it directly implicated Major Crane as the perpetrator of the shooting that resulted in the death of Randall Todd. Therefore, the out-of-court statements, and particularly Crane's confession, were the only evidence that he was guilty of the crime charged. Much of the testimony presented at trial was an attempt to corroborate Crane's confession and show its correlation with facts known by the police through their independent investigation. Crane, of course, attempted to take the opposite tack, but was prevented from doing so. The testimony is arranged in a manner that will more clearly reflect the objectives of the parties at trial and the nature of the error set forth in this brief. The petitioner first presents a short procedural history to explain the posture of the case now before the Court, followed by a statement of material facts.

(A) Procedural History

This case began with the return of an Indictment by the Jefferson County, Kentucky Grand Jury on October 13, 1982.

(Transcript of Record, TR 1) which alleged that Major Crane or George Williams, either alone or in complicity with each other, committed the offense of Murder [Ky. Rev. Stat. (KRS) 507.020] by shooting Randall Todd, a clerk at the Keg Liquor Store on August 7, 1981. (TR 1). A three day trial was held in Jefferson Circuit Court on the indictment and resulted in a conviction for wanton murder and a recommended sentence of 40 years imprisonment. (TR 152). This recommendation was accepted by the trial judge. Final judgment imposing the sentence was entered on January 5, 1984. (J.A. 65-67).

Timely appeal was taken directly to the Supreme Court of Kentucky as required by court rule. [Ky. R. Criminal Proc. (R.Cr.) 12.02]. In that court Crane raised as his sole ground for reversal the refusal of the trial judge to allow him to elicit testimony concerning the circumstances under which his confession was taken for purposes of attacking the believability of that confession. (J.A. 68-69). By opinion rendered February 28, 1985, the judgment of the trial court was affirmed on the ground that "there was no error in excluding from the jury the circumstances relating solely to voluntariness." (J.A. 71). Timely petition for rehearing in the Supreme Court of Kentucky was denied on June 13, 1985 (J.A. 79). Certiorari was granted in this case on December 9, 1985. (J.A. 80).

(B) Statement Of The Case

(1) Discovery Of The Crime And Police Investigation

Randall Todd was found shot in the Keg Liquor Store at about 10:40 p.m. on August 7, 1981. (Transcript of Evidence, TE II p. 9). The police suspected that Todd had been shot during the course of a robbery, but found that no money had been taken from the store. (TE IV 54). Although the police made an extensive search of the liquor store and the area immediately surrounding it, they were unable to find much physical evidence beyond several fingerprints, a footprint, and some tire tracks. (TE II 12, 31-33). None of this evidence indicated the identity of the person(s) involved. As a result of an autopsy conducted on Randall Todd, the police recovered a

single .32 caliber bullet. (TE II 5). However, the bullet was damaged to the point that the state firearms inspector could not determine anything except the caliber of the bullet and the types of pistols from which the bullet could have been fired. (TE II 62-65). No other physical evidence was discovered, and at this point the police had no suspect in the crime. Major Crane became involved in the case only after he was arrested on another, unrelated charge.

(2) Arrest And Interrogation Of Petitioner

On August 14, 1981, a juvenile named Patrick Holder was arrested because of his participation in a break-in at a service station the previous night. (J.A. 2). He named Major Crane as his accomplice. Crane was located almost immediately, was arrested and was taken to a police substation. While the police officer was typing an arrest slip,

[. . .] just out of the clear blue sky, he said, 'I confess.' He said 'I confess.' (J.A. 4).

Although the officer at first ignored the confessions, Crane persisted. In rapid succession he confessed to robbing a hardware store, to shooting a policeman and to robbing some people at a bowling alley. (J.A. 4). It was subsequently learned by police that Crane was not involved in the shooting (J.A. 9-10) and that he was lying about the hardware store robbery. (J.A. 7). However, he denied knowing anything about the shooting at Keg Liquors. (J.A. 5).

The subject of Keg Liquors was brought up again after Crane was brought to the Juvenile Detention Center. (J.A. 13). Crane was talking about the purported robbery of the hardware store. He said that the clerk set off an alarm and when that happened, he fired a shot up in the air. When the police officer pointed out that no one was shot at the hardware store, Crane said that he was talking about Keg Liquors, "where that guy got killed." (J.A. 7). At this point, the police taped a statement from Crane in which he implicated himself in an attempted robbery of the liquor store and in shooting the

clerk. (J.A. 7).¹ In general, the statement showed familiarity with the interior of the liquor store. However, many of Crane's statements were contradicted by facts discovered by the police in their investigation.

Based on Crane's statement and the recorded statement of the co-defendant, George Williams, Crane was charged with murder.

Before the trial began, the petitioner moved to suppress his out-of-court statements. (TR 36). This motion, pursuant to Ky. R. Crim. Proc. (R.Cr.) 9.78 was heard nearly a month before trial. As required by the court rule, the trial judge made findings of fact and conclusions of law as to the voluntariness of the statement. (J.A. 21-22; Supp. TE 73-76). The motion to suppress was overruled. (J.A. 22; Supp. TE 76).

(3) Trial Strategies Of The Parties

In opening statements the parties set out their theories of the case. The prosecutor admitted that his case was premised almost entirely on oral testimony (TE I 10), i.e. on the statements of the petitioner, of George Williams and of Geraldine Crane, the petitioner's mother. (TE I 13-15). For the defense, counsel presented a theory that the story told by Major Crane in his confession was simply that, a story. Counsel proposed to show the incredibility of the confession by showing its inconsistencies with facts known for certain by the police and also by showing the circumstances under which the statement was given. The purpose of evidence concerning the circumstances surrounding the confession was to "cast a doubt on its credibility." (J.A. 23). Before any evidence was taken, the prosecutor moved *in limine* to prevent introduction of evidence concerning the taking of the confession. (J.A. 27). The prosecutor argued that this line of evidence would be an attack on the voluntariness of the confession, a matter that had been settled conclusively at the suppression hearing. (J.A. 27). Defense counsel pointed out that the circumstances surround-

¹ The transcript of the taped statement is set out in the Joint Appendix on pages 32-40.

ing the taking of the confession were to be used to attack the credibility of the confession, not its voluntariness. (J.A. 27-28). The trial court ruled that defense counsel could not ask specific questions as to the length of time of the interrogation or the fact that the petitioner was alone with police officers during the interrogation. (J.A. 28-29). The trial court noted that the questions the petitioner wished to ask

[s]eem to the Court to smack of voluntary giving or the nature of the statements being given voluntarily and that is beyond the pale at this point in time. (J.A. 29).

The petitioner did not present testimony concerning the circumstances surrounding procurement of the confession, but did preserve testimony by way of avowal (J.A. 45-53) showing that the petitioner, who was 16 years of age at the time, was kept in a small, windowless 10 by 12 foot room from shortly after 7:00 p.m. until about 8:40 p.m. During this time he was alone in the room with several police officers undergoing interrogation. (J.A. 45-53; Supp. TE 36-37).²

(4) Appeal To The Supreme Court Of Kentucky

The jury returned a verdict of guilty on the charge of wanton murder [Ky. Rev. Stat. (KRS) 507.020(b)]. On appeal from this conviction, the petitioner argued that the trial judge erred by refusing to allow him to develop the circumstances surrounding the procurement of the confession and that the error denied him his right to confront witnesses and to present a defense. (Petitioner's Brief on Appeal, p. 7). The petitioner maintained that no worthwhile state purpose was served by exclusion, and that as a matter of state evidence law, the excluded testimony was obviously admissible under the multiple admissibility rule. (Petitioner's Brief on Appeal, pp. 8-10). Accordingly, the petitioner argued that the requirement that a legitimate state interest be shown to justify denial of the two constitutional rights was not met and the rights were improperly denied.

² During the suppression hearing, defense counsel introduced evidence that the petitioner, despite being sixteen years old, was operating at the level of a third or fourth grade child. (Supp. TE 36-37).

In its opinion on the case, the Supreme Court of Kentucky held that the trial court's ruling on the prosecutor's *in limine* motion was, in effect, a ruling that the rejected evidence "related solely to voluntariness and would not be admitted." (J.A. 69). From this ruling that court concluded that "there was no error in excluding from the jury the circumstances relating solely to voluntariness." (J.A. 71). On this basis, the Supreme Court of Kentucky rejected the petitioner's argument and affirmed his conviction. (J.A. 72). Timely petition for rehearing was denied and petitioner now seeks redress in this Court.

SUMMARY OF THE ARGUMENT

In *Jackson v. Denno*, 378 U.S. 368 (1964) and *Lego v. Twomey*, 404 U.S. 477 (1972), the Court discussed issues pertinent to the determination of a confession's voluntariness and its use as evidence at trial. The Kentucky Supreme Court in its opinion in the case at bar has formulated a rule that precludes the jury from considering evidence relevant to the voluntariness of a confession. The rule is based on the Kentucky court's misinterpretation of the *Jackson* and *Lego* decisions.

The theory of defense in the case at bar was that the confession of the petitioner, who was at the time sixteen years old and operating at a third or fourth grade level, was untrustworthy and unreliable. The Kentucky Supreme Court ruled that the petitioner was properly allowed to introduce evidence that his confession contained inconsistencies and mistakes of fact. However, the court ruled that the trial judge's findings of fact as to the confession's voluntariness were conclusive and the jury could therefore not be presented with evidence related "solely to the issue of voluntariness." Thus, the Kentucky Supreme Court ruled that the petitioner was prohibited from introducing evidence at trial about the circumstances surrounding procurement of his confession, to wit, evidence of the number of police officers who interrogated the petitioner, the length of the interrogation and the dimensions of the room in which the interrogation was conducted. The Kentucky court concluded that such evidence was not relevant to the confession's reliability and credibility and therefore was inadmissible. The

rule adopted by Kentucky violates rights guaranteed to criminal defendants by the Sixth and Fourteenth Amendments.

A rule that a defendant cannot present the jury with evidence relating to the voluntariness of his confession or the circumstances under which it was procured nullifies the right to present a defense. The constitutional violation cannot be avoided simply because a defendant is permitted to introduce evidence related "solely to a confession's reliability and credibility" but not allowed to present evidence related "solely to a confession's voluntariness." The distinction sought to be drawn between the two types of evidence is an artificial one that has no support in logic or constitutional law. Indeed, the jury cannot be expected to correctly determine the reliability and credibility of a confession if it is prohibited from hearing evidence as to its voluntariness or the circumstances surrounding its procurement. The issue of voluntariness relates directly to the confession's reliability and credibility. Facts relating to a confession's voluntariness are inseparably interwoven with facts germane to a confession's believability. This Court has noted that the issue of the truth or reliability of a confession is not the primary consideration of the trial judge in the course of conducting a voluntariness hearing. Yet, the rule adopted by Kentucky prevents the jury from considering all the facts relevant to the reliability of a confession. The rule therefore constitutes a substantial infringement on a defendant's right to confront and cross-examine the witnesses against him and his right to a jury trial.

The effect of the rule is to prevent a defendant from cross-examining witnesses who played a role in the procurement of the confession. Stripped of the right to question witnesses as to the circumstances under which a confession was obtained, defense counsel is left in the position of urging the jury to conclude that a confession is untrustworthy without being able to introduce the specific evidence upon which that conclusion is based. In effect, the defendant is denied the means by which to fully and effectively present his defense.

Moreover, the rule adopted by Kentucky allows the trial judge to usurp the function of the jury by being the final arbiter

of the facts surrounding the taking of a confession. The rule therefore substantially undermines a defendant's right to trial by jury. Kentucky's position is that the findings of fact made by the trial judge are conclusive regarding a determination as to a confession's voluntariness. Those facts are, in effect, to be accepted at trial without challenge by the defense and without question or review by the jury. That situation hardly comports with the fundamental principle of trial by jury. A defendant is, of course, constitutionally entitled to have his guilt or innocence decided by a jury. That right is effectively negated by operation of a law which permits certain evidence, relevant to the issue of guilt or innocence, to be insulated from the jury's consideration.

A primary justification for the rule enunciated by the Kentucky Supreme Court is that jurors are incapable of separating evidence pertaining to voluntariness from evidence pertaining to the confession's credibility and are therefore likely to misuse the evidence. Kentucky's view that jurors have limited ability to properly discern and apply the evidence is supported neither by logic nor practice.

That jurors are indeed capable of making proper use of evidence is reflected in the universal acceptance of the multiple admissibility rule which recognizes that evidence can be admitted for more than one reason at trial. As the appendices to this brief demonstrate, the overwhelmingly majority of jurisdictions permit jurors to consider evidence of a confession's voluntariness or the circumstances surrounding procurement of the confession. This is true whether the jurisdiction allows a jury to make a specific and independent finding as to the voluntariness of a confession or whether such evidence is to be utilized for the purpose of deciding the confession's credibility or the weight it is to be given.

The rule enunciated by the Kentucky Supreme Court divests the jury of its traditional function of being the ultimate fact-finder. The jury's role is, in effect, usurped by the trial judge, who is authorized to make conclusive findings of fact during the course of a voluntariness hearing. The conclusiveness of the judge's findings of fact are not limited to the issue of the

confession's admissibility. The conclusiveness of the judge's factfinding process is intended to permeate the jury's traditional role and bind both the defendant and the jury to passive acceptance of those facts. Trial by jury therefore becomes little more than a fiction.

Usurpation of the jury's function by the trial judge also has an additional due process ramification. The Fourteenth Amendment imposes upon the prosecution the burden of proving a defendant's guilt beyond a reasonable doubt. Evidence pertaining to a confession's voluntariness or the circumstances surrounding its procurement is germane to the issue of guilt or innocence particularly in cases where a confession is the primary evidence against a defendant. Thus, the question of guilt or innocence may turn largely on the credibility of the confession and the weight attributed it by the jury. Since the issue of the confession's voluntariness and its admissibility is governed by the preponderance of the evidence standard, the Kentucky rule, by making the findings of the trial judge conclusive, operates in a manner designed to insulate evidence relevant to the issue of guilt or innocence from application of the reasonable doubt standard. The result is patently unconstitutional.

Lastly, the Kentucky rule forces a defendant to choose between various rights guaranteed by the United States Constitution. As a justification for its rule, the Kentucky Supreme Court found that evidence of a confession's voluntariness is selective or limited when a defendant does not testify at trial, because the jury would not be apprised of his previous experience with the law, his knowledge of interrogation procedures or his familiarity with his *Miranda* rights. The Kentucky rule therefore penalizes the defendant for exercising his Fifth Amendment right because he is precluded at trial from challenging the voluntariness of his confession. No legitimate interest of the state is advanced by such a rule because the prosecution which introduces evidence supporting a finding of voluntariness would hardly be impaired by the defendant who does not testify and thereby leaves the state's evidence largely un rebutted.

Moreover, the Kentucky rule puts a defendant in the position of being forced to choose between his due process right to have an involuntary confession excluded and his rights to present a defense and confront and cross-examine witnesses. The Kentucky rule would apparently allow a defendant, who did not exercise his right to a voluntariness hearing conducted by the judge, to challenge the voluntariness of the confession during the case-in-chief. On the other hand, a defendant who submitted the initial determination of voluntariness to the trial judge, would not be permitted to present evidence to the jury about the circumstances surrounding procurement of the confession because the facts pertinent to that issue would have been conclusively determined by the judge. The effect of the Kentucky rule is therefore unconstitutional.

In light of the Sixth and Fourteenth Amendment violations delineated above, the Court is urged to rule that a defendant is constitutionally entitled to submit evidence of the voluntariness of a confession and the circumstances surrounding its procurement to the jury so that it can properly determine the confession's reliability, credibility and the weight it is to be given.

ARGUMENT

IN A CRIMINAL CASE A STATE TRIAL COURT VIOLATES THE RIGHTS GUARANTEED TO A DEFENDANT BY THE SIXTH AND FOURTEENTH AMENDMENTS WHEN IT REFUSES TO PERMIT HIM TO PRESENT TO THE JURY THE FACTS RELATING TO THE CIRCUMSTANCES SURROUNDING THE PROCUREMENT OF HIS CONFESSION AND THE WEIGHT TO BE GIVEN THEM WHEN THOSE SAME FACTS HAVE BEEN CONSIDERED AND CONCLUSIVELY DETERMINED BY THE TRIAL JUDGE IN HIS PRE-TRIAL DETERMINATION OF THE ADMISSIBILITY OF THE CONFESSION.

I

DEVELOPMENT OF THE LAW REGARDING ISSUES PERTINENT TO THE VOLUNTARINESS OF A CONFESSION.

A. United States Supreme Court's Approach: *Jackson v. Denno* And *Lego v. Twomey*.

In *Jackson v. Denno*, 378 U.S. 368 (1964), the Court held that "A defendant objecting to the admissibility of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Id.* at 380. The Court found that rule to be rooted in the Due Process Clause of the Fourteenth Amendment which requires the implementation of procedures designed "to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Id.* at 391.

The Court noted that lower courts had adopted several approaches in determining the voluntariness of a confession. In addition to the New York approach which was being scru-

tinized in *Jackson*,³ two other major classifications were recognized. *Jackson*, 378 U.S. at 378 n.9. Some jurisdictions followed the Wigmore or orthodox rule "under which the judge himself solely and finally determines the voluntariness of the confession." *Jackson*, 378 U.S. at 378. Other jurisdictions adhered to the Massachusetts rule "under which the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused . . ." *Id.* at 378.

The New York rule was found constitutionally infirm because it did not provide a reliable determination of a confession's voluntariness. The procedure provided no method of determining "whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it." *Jackson*, 378 U.S. at 379. Moreover, there was no indication of how factual disputes were resolved or if they were resolved at all.

Thus, *Jackson* focused on the method by which the threshold admissibility of a confession was to be determined. Later decisions would more closely examine the interplay between the jury's role as the ultimate fact-finder and the use of a defendant's confession as evidence.

Referring to its decision in *Jackson v. Denno*, the Court stated in *Sims v. Georgia*, 385 U.S. 538 (1967):

A constitutional law was laid down in that case that a jury is not to hear a confession unless and until the trial judge

³ Under the New York procedure, the trial judge must make a preliminary determination about a confession and exclude it if it could not be considered voluntary under any circumstances. However, if a question existed as to the confession's voluntariness, it was to be admitted into evidence and submitted to the jury which would make the ultimate determination on the voluntariness and truthfulness of the confession. The jury was instructed "that if it found the confession involuntary, it was to disregard it entirely, and determine guilt or innocence solely from the other evidence in the case, . . . if it found the confession voluntary, it was to determine its truth or reliability and afford it weight accordingly." *Jackson*, 378 U.S. at 374-375.

has determined that it was freely and voluntarily given. The rule allows the jury, if it so chooses, to give absolutely no weight to the confession in determining the guilt or innocence of the defendant but it is not for the jury to make the primary determination of voluntariness. *Id.* at 543-544.

The admission of a confession into evidence does not require the jury to abdicate the historical role it plays in American jurisprudence. The jury is still required to consider and scrutinize a defendant's confession just as it would any other evidence, notwithstanding a judicial determination that the confession is indeed admissible. *Jackson* makes it clear that the Court never intended the jury to abandon its traditional role as the ultimate factfinder. On the contrary, the Court underscored the jury's function:

The question of the credibility of a confession, as distinguished from its admissibility, is submitted to the jury in jurisdictions following the orthodox Massachusetts, or New York procedure. Since the evidence surrounding the making of a confession bears on its credibility, such evidence is presented to the jury under the orthodox rule not on the issue of voluntariness or competency of the confession, but on the issue of its weight. Just as questions of admissibility of evidence are traditionally for the court, questions of credibility, whether of a witness or a confession, are for the jury. This is so because trial courts do not direct a verdict against the defendant on issues involving credibility.

A finding that the confession is voluntary prior to admission no more affects . . . the jury's view of the reliability of the confession than a finding in a preliminary hearing that evidence was not obtained by an illegal search affects the instruction on or the jury's view of the probativeness of this evidence.

The failure to distinguish between the discrete issues of voluntariness and credibility is frequently reflected in opinion which declare that it is the province of the court to resolve questions of admissibility of confessions, as with all other questions of admissibility of evidence, the province of the jury to determine issues of credibility, but which then approve the trial court's submission of the voluntariness question to the jury. Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U.Chi.L.Rev. 317, 320-321 (1954).

Jackson, 384 U.S. at 386 n.13.

The relationship between the jury's function as factfinder and its consideration of confessions deemed voluntary (and therefore admissible) was also examined several years later in *Lego v. Twomey*, 404 U.S. 477 (1972).

Citing its decision in *Rogers v. Richmond*, 365 U.S. 534 (1961), the Court noted that the voluntariness hearing required by *Jackson* was not intended to be used as a vehicle by which unreliable confessions were excluded from evidence. "The sole issue in such a hearing is whether a confession was coerced. Whether it be true or false is irrelevant . . ." *Lego v. Twomey*, 404 U.S. at 484 n.12. The voluntariness hearing serves a purpose that is separate and distinct from the task that the jury is expected to perform. The Court made that point unmistakably clear in *Lego*:

Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took away from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure . . . juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief.

Id. 404 U.S. at 485-486 (Footnote omitted).

While *Jackson* and *Lego* touched upon the respective roles of the judge and jury regarding the admissibility of a confession and its ultimate use as evidence at trial, those decisions do not address the specific issue presented in the case at bar. Neither *Jackson* nor *Lego* has precisely defined the jury's function, as a matter of constitutional law, once a confession has been admitted into evidence.⁴ Evidence that is admitted at a hearing to

⁴One commentator has noted that "*Jackson* . . . impliedly approves permitting the jury to reexamine the voluntariness determination where the judge tentatively admits the evidence . . ." Salt-

determine the voluntariness of a confession necessarily overlaps with the evidence upon which a jury must examine and consider a confession as it would any other evidence. Thus, there exists a need to clearly establish the parameters of the jury's function as it pertains to confessions which are admitted into evidence. The lack of any specific guidelines regarding the issue presented herein has prompted the Kentucky Supreme Court to fashion a rule which not only strips a defendant of his right to present a defense⁵ but also undermines his rights of confrontation and cross-examination.⁶ Application of the Kentucky Supreme Court's decision on the merits of the case at bar⁷ ultimately violates the Due Process Clause of the Fourteenth Amendment and abridges a defendant's right to trial by jury.⁸ Thus, it would be useful to analyze Kentucky decisions interpreting *Jackson* and *Lego*.

B. Kentucky's Approach

Jackson v. Denno was first considered by Kentucky's highest appellate court in *Bradley v. Commonwealth*, Ky., 439 S.W.2d 61 (1969).⁹ Bradley challenged the trial court's failure to suppress certain evidence. In upholding the admissibility of the

zburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 278 n.27 (1975). Professor Saltzburg concludes that "Even in the majority of jurisdictions where the judge's preliminary determination is final, the defendant has the right to present evidence of coercion because it bears on the weight to be given the confession." *Id.*

⁵ *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967); *In re Oliver*, 333 U.S. 257 (1948).

⁶ *Pointer v. Texas*, 380 U.S. 400 (1965).

⁷ *Crane v. Commonwealth*, Ky., 690 S.W.2d 753 (1985); (J.A. 68-78).

⁸ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁹ The Court of Appeals was Kentucky's highest appellate court until 1976 when the Judicial Article of the Kentucky Constitution was adopted and created the Kentucky Supreme Court and an intermediary Court of Appeals. See Section 109 of the Kentucky Constitution.

evidence, the Court noted Kentucky's procedure which provided that "when the evidence presents a question as to whether a person has voluntarily consented to a search, it should be submitted to the jury by an appropriate instruction." *Id.* at 63 (other citation omitted). The court then focused on the implications that *Jackson v. Denno* had on Kentucky procedure and concluded that "If the voluntariness of a confession cannot constitutionally be determined solely by the jury which at the same time is determining the defendant's guilt or innocence, neither should the voluntariness of a consent to search." *Bradley*, 439 S.W.2d. at 63. For the purpose of conforming with *Jackson v. Denno*, the Kentucky Court of Appeals adopted a rule applicable to the suppression of confessions or other evidence:

[T]he question of voluntariness (in case of a confession) or consent (in case of a search) should be first determined by the trial judge outside the presence of the jury on the basis of an evidentiary hearing of the pertinent evidence on both sides. Only if the trial court finds the evidence to have been validly obtained is it admissible in evidence before the jury, in which event we think the the trial court should admonish the jury not to consider the evidence unless it finds beyond a reasonable doubt that the defendant freely and voluntarily consented to the search (or, in the case of a confession, that he gave it voluntarily and free of coercion).

Bradley, 439 S.W.2d at 64 (footnotes omitted).

The admonition to which the court made reference in *Bradley* became standard procedure in Kentucky trial practice. See *Palmore*, *Kentucky Instructions to Juries*, § 12.70, p. 404 (1975).¹⁰ Kentucky thus recognized that the judge and jury must fulfill their individual roles when a confession is offered and received into evidence. The trial judge's initial determina-

¹⁰ The suggested admonition reads as follows: "The defendant's statement [read to you] [related to you] by the witness . . . must be disregarded, and may not be considered by you to any extent whatever, unless you believe from the evidence beyond a reasonable doubt that the defendant made the statement (if he did so) voluntarily and free of coercion." *Palmore* at 404.

tion of the voluntariness of a confession was obviously not intended to preempt the jury's function of making an independent examination and consideration of the confession's reliability and credibility.

The distinct roles of the judge and jury were again noted in *Britt v. Commonwealth*, Ky., 512 S.W.2d 496, 499 (1974) in which the court held:

The procedure to be followed when the voluntariness of a confession is challenged was laid out in *Bradley v. Commonwealth*, Ky., 439 S.W.2d 61 (1969). On a motion to suppress, the trial court must conduct an evidentiary hearing in chambers. Only if he is satisfied from substantial evidence that the confession was voluntary (and is not otherwise inadmissible) can it then be heard and considered by the jury. Constitutionally, this is all that is required, and if the trial court's determination is supported by substantial evidence it would be conclusive, cf. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), but for the additional protection prescribed in *Bradley* to the effect that if the defendant chooses to carry the question to the jury he may do so with the benefit of an admonition that the evidence shall not be considered unless the jury believes that the confession was made voluntarily and free of coercion. 439 S.W.2d at p. 64.

Although the Kentucky court considered the judge's findings on the voluntariness of the confession to be conclusive, that can only mean the judge's ruling is conclusive in the sense that the confession is deemed voluntary for the purpose of admitting it into evidence. To conclude otherwise would violate the rulings in *Jackson v. Denno* and *Sims v. Georgia*, which perceive the function of the trial judge as a limited one, i.e. to make the initial determination of whether the confession should be admitted into evidence at all. The trial judge's ruling on the admissibility of the confession can neither encroach nor supplant the jury's duty to weigh the evidence and determine its reliability and credibility. *Jackson v. Denno*, 378 U.S. at 386 n. 13; *Sims v. Georgia*, 385 U.S. at 544. Indeed, it was specifically noted in *Lego v. Twomey* that the requirement of a *Jackson* hearing did not undermine or strip the jury of its duty to determine the credibility, accuracy and weight of a defendant's confession. *Lego v. Twomey*, 404 U.S. at 485-486.

Kentucky recognized the mandatory nature of the *Jackson* hearing in *Jones v. Commonwealth*, Ky., 560 S.W.2d 810 (1977). The court reiterated its decision in *Bradley* that once the trial judge ruled that a confession was voluntary and therefore admissible, the question of voluntariness must likewise be submitted to the jury. *Id.* at 814.¹¹

Ostensibly to avoid recurrence of the situation in *Jones v. Commonwealth* and to ensure compliance with *Jackson v. Denno*, the Kentucky Supreme Court promulgated Rule of Criminal Procedure (RCr) 9.78. The rule, which was adopted on October 1, 1977 and became effective on January 1, 1978, provides:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by him to police authorities or (b) the fruits of a search, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

In *Hamilton v. Commonwealth*, Ky., 580 S.W.2d 208, 210 (1979), the court explained the intent underlying its promulgation of RCr 9.78:

The effect of RCr 9.78 is to obviate the procedural requirement of submitting the issue of voluntariness of a confession to a jury following the determination of that issue by the trial judge. Consequently, since we have held in this opinion that the trial judge found that appellant's confession is admissible, it follows that there was no error in his failure to present the issue of voluntariness to the jury. The finding of the trial judge is conclusive and an admonition to the jury was unnecessary.

¹¹ "[I]f the confession were found to be voluntary, the failure to submit the question of voluntariness to the jury would constitute error." *Jones*, 560 S.W.2d at 814.

By its decision in *Hamilton*, the Kentucky Supreme Court made it unmistakably clear that it intended RCr 9.78 to operate in such a manner that the jury would be completely divested of its prior role in determining the voluntariness of a confession. Moreover, the clear implication of the court's ruling that the findings of the trial judge were conclusive, was that the jury was rendered incapable of examining and questioning the facts surrounding procurement of the confession. Subsequent decisions of the Kentucky Supreme Court leave no doubt that it fully intended the judge's findings of fact on suppression matters to be binding on the jury and accepted by it without challenge. For all practical purposes, the trial judge was permitted to usurp the function of the jury.

In *Diehl v. Commonwealth*, Ky., 673 S.W.2d 711 (1984) the defendant moved to suppress various items obtained in a search of his residence. As grounds for his motion, the defendant argued that his wife's consent to search the premises had not been voluntarily given. A suppression hearing was conducted but the defendant's wife did not testify. Relying on testimony given by the police officers who conducted the search, the trial court found that the defendant's wife voluntarily consented to the search and therefore overruled the motion to suppress. The defendant's wife was called to testify during the case-in-chief and defense counsel sought to question her about the circumstances surrounding her consent to the search. The trial court precluded any questioning on that aspect of the case.

On appeal the defendant argued that the trial court erred by refusing to allow him to question his wife relative to her consent to the search. Relying on RCr 9.78, the Kentucky Supreme Court upheld the trial court's ruling. The court stated, "Where a pre-trial suppression hearing is conducted to determine the admissibility of fruits of a search, the trial court's findings of fact are conclusive as to the issues raised, if supported by substantial evidence. Cf. *Hamilton v. Commonwealth*, Ky., 580 S.W.2d 208 (1979)." *Id.* at 712. In light of the court's reliance on RCr 9.78, its ruling is equally applicable to cases involving a defendant's confession. The Kentucky

Supreme Court obviously construes the word "conclusive" in RCr 9.78 as conclusive for all purposes, even to the extent that the jury is passively bound to accept evidence without question.¹² As noted above, such an approach is in direct contravention with the rationale underlying this Court's decisions in *Jackson v. Denno*, *Sims v. Georgia*, and *Lego v. Twomey*.

In its decision in the case at bar, the Kentucky Supreme Court left no doubt that it is within the exclusive domain of the trial judge to determine any issue as to voluntariness of a confession. *Crane v. Commonwealth*, Ky., 600 S.W.2d 753, 754 (1985) (J.A. 71). The issue was considered to be completely beyond the scope of the jury's function. *Id.* At trial the petitioner argued that he should be able to develop the circumstances under which his statement was obtained because they were related to the issue of the statement's credibility and reliability. The trial court ruled that evidence pertaining to the length of time over which the petitioner, a 16 year old boy,¹³ was questioned, the size of the interrogation room, the number of police officers present and the absence of any social worker or member of the petitioner's family, "related solely to voluntariness" and therefore could not be admitted into evidence and submitted to the jury. *Id.* at 754; (J.A. 69).

Concluding that there "was no error in excluding from the jury the circumstances relating solely to voluntariness," the Kentucky Supreme Court affirmed the ruling of the trial court. *Id.* at 754; (J.A. 71). Relying on its decision in *Diehl*, the court

¹² The strength of the petitioner's contention is not in anyway dissipated by the fact that the defendant's wife in *Diehl* did not testify at the suppression hearing. The opinion rendered by the Kentucky Supreme Court obviously put the issue of voluntariness beyond the parameters of the jury's role as the ultimate factfinder because even if the defendant's wife testified at the suppression hearing, the court considered the police officer's testimony to constitute substantial evidence for the purpose of upholding the trial judge's decision to admit the evidence obtained in the search.

¹³ The petitioner was functioning at a third or fourth grade level. (Supp. TE 36-37).

reasoned that "findings of the trial court were conclusive on that issue." *Id.* at 754-755; (J.A. 71). The court ruled that the petitioner was entitled to present to the jury only issues which related to the credibility of the confession, i.e. factual inaccuracies and inconsistencies contained within the confession. Any question or review of the voluntariness issue was perceived to be "the function of the appellate court, not the jury." *Id.* at 755; (J.A. 71).

The court's ruling was based on several premises which will be discussed in more detail elsewhere in this brief. It is sufficient to say at this point that the court believed that juries were incapable of making a distinction between evidence pertaining to voluntariness and evidence pertaining to credibility and that the matter was better left in the hands of the trial judge. *Id.* at 755; (J.A. 72). Moreover, the court considered "the issue of voluntariness [to be] a settled issue, no longer debatable except on appeal." *Id.* at 755; (J.A. 72). Acceptance of those premises led the court to conclude that:

[O]nce a hearing is conducted pursuant to RCr 9.78 and a finding is made by the judge based upon substantial evidence that the confession was voluntary, that finding is conclusive and the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue. This shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability or credibility of the confession. *Id.* at 755; (J.A. 72).

By precluding the jury from considering the circumstances under which a confession is obtained, Kentucky's position not only abridges a defendant's rights to a jury trial and cross-examination but also creates a tension between the exercise of rights guaranteed by the United States Constitution. As will be shown, Kentucky's myopic view as to a jury's inability to discern the purpose of evidence submitted to it is not shared by other jurisdictions.

II

THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER TO INTRODUCE BY MEANS OF CROSS-EXAMINATION EVIDENCE OF THE CIRCUMSTANCES SURROUNDING THE TAKING OF THE CONFESSION DENIED PETITIONER DUE PROCESS OF LAW AND HIS RIGHT TO CONFRONT WITNESSES.

The petitioner here maintains that he was denied due process of law, guaranteed by the Fourteenth Amendment, by the trial court's ruling that he could not introduce, in chief, evidence of the circumstances which attended the taking of his confession. This ruling denied him the right to put on a defense as that right is set out in *Chambers v. Mississippi*, 410 U.S. 284 (1973). Because the evidence desired by the petitioner was to be gained through cross-examination of the prosecution witnesses, the trial court's ruling denied him the Sixth Amendment right (made applicable through the Fourteenth Amendment) to confront and cross-examine witnesses. *Chambers*, 410 U.S. at 295. Careful reading of *Chambers* shows that these two closely related rights should be considered separately. In *Chambers* the Court examined the failure to allow cross-examination and the refusal to allow witnesses to be called. 410 U.S. at 295, 298. Together, these erroneous rulings denied Chambers "a trial in accord with traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302. This Court's ultimate holding was that the facts and circumstances of *Chambers* showed that the rulings of the trial court denied him a fair trial. 410 U.S. at 303. From this, it has been deduced that cases involving denial of the opportunity to put on a defense will stand or fall on their particular merits. Westen, "The Compulsory Process Clause," 73 Mich. L. Rev. 71, 152 (1974); Churchwell, "The Constitutional Right to Present Evidence: Progeny of *Chambers v. Mississippi*," 19 Criminal Law Bulletin 131, 137, 141-143 (1983). Thus, the legal problem to be solved in the present case may be clearly stated: taking into account the deference due state court rules of procedure, did the trial court (and the Supreme Court of Kentucky which

affirmed the lower court's action) deny Major Crane the opportunity to defend himself and to cross-examine witnesses when it refused to allow him to elicit for the jury's consideration facts concerning the circumstances attendant to the taking of his confession on August 14, 1981? The mechanism for determining this question is set out in *Chambers* and has already been employed in this case. Put simply, the propriety of a court's denial of the right to cross-examine and to put forth a defense is decided by examining closely the interests to be served by allowance or denial of the desired action. Because the rights spoken are of "essential" and "fundamental" to a fair trial, their denial or restriction can only be justified by the existence of a legitimate state interest. *Chambers*, 410 U.S. at 295. However, the relative values of the competing interests are to be "closely examined." *Chambers*, 410 U.S. at 295.

The competing interests in the present case are clearly established. As shown in the Statement of the Case, the most powerful evidence against the petitioner was his own out-of-court confession. The Commonwealth of Kentucky had virtually no physical evidence to link anyone with the crime (TE II 12, 31-33). The most important pieces of such evidence were a thirty-two (.32) caliber bullet recovered from the deceased (TE II 5, 62-65) and a half-pint bottle of T.W. Samuels Whiskey (TE II 11). These items corroborated portions of Crane's confession (TE II 46; J.A. 11, 36-37). However, there was really nothing else to link Crane with the shooting except his confession, the confession of the co-defendant, George Howard Williams, and the out-of-court statement of Geraldine Crane, the petitioner's mother.¹⁴ (TE IV 8-19, 62). Williams obviously had reason to minimize his part in the shooting incident. Had he not done so, he would have been charged as the triggerman. (TE III 24-25). However, Williams' out-of-court statement mentioned the half-pint of T.W. Samuels and the use of a thirty-two (.32) caliber

¹⁴ These last two statements were admissible as substantive evidence pursuant to *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969), which allows out-of-court statements to be introduced as evidence when the declarant denies making a statement or professes not to remember.

pistol at the liquor store. (TE III 17, 27). Clearly, this was corroborative of the confession given by the petitioner. It was essential to the success of the defense either to exclude the confession given by the petitioner on the grounds of involuntariness or to introduce evidence so it would be disbelieved by the jury. The petitioner invoked Ky. R. Crim. Proc. (R.Cr.) 9.78 to attempt the former course. (TR 36). The trial court, as required, conducted a hearing on suppression and stated its findings and conclusions upon its decision to admit the confession. (J.A. 21-22; Supp. TE 73-76). The petitioner then adopted a trial strategy to show that the factual inaccuracies of the confession and "the very circumstances surrounding the giving of the statement" cast doubt on the credibility of the confession. (J.A. 23). As to the circumstances of the confession, Crane intended to rely on a showing of his age (16 at the time of the shooting), the length of time he was interrogated (one hour and 40 minutes), the size of the room in which the interrogation took place (10 feet by 12 feet), and his isolation in the room with five police officers. (J.A. 23-24, 46-47, 49-50). And, of course, if the petitioner did not testify, the desired evidence would have to be presented through those persons with knowledge of the event, the police officers who conducted the interrogation. This would be accomplished by cross-examining these officers concerning the event.

The interest of the Commonwealth of Kentucky, as it can be inferred from the record of the trial court and the opinion of the Supreme Court of Kentucky, was to prevent relitigation of the issue of voluntariness in front of the jury for fear that the jury would misuse the evidence concerning the taking of the confession and discount its value because it was involuntary. (J.A. 28-29, 52-53). In its opinion, the Supreme Court of Kentucky characterized the evidence sought to be admitted as "solely" related to the voluntariness of the confession. *Crane v. Commonwealth*, Ky., 690 S.W.2d 753-754 (1985); (J.A., 71).¹⁵ In

¹⁵ This characterization was repeated in two other places in the opinion. *Crane v. Commonwealth*, 690 S.W.2d at 754-755; (J.A. 69, 71).

order to insure the conclusiveness of the determination of voluntariness under R.Cr. 9.78 (which the court said applied the orthodox rule), the Supreme Court of Kentucky ruled that "the trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue." *Id.* at 754; (J.A. 72). This strict rule was deemed justified by "the dangers inherent in admitting evidence before the jury concerning the circumstances attendant to the taking of the confession . . ." *Id.* at 754; (J.A. 71). These dangers are three in number. First, the court perceived a difficulty in separating the "factors" relating to voluntariness from those relating to credibility. It therefore vested the separation in the hands of the trial judge and not in the minds of the jurors. Second, there was no reason to consider voluntariness because that matter was settled and could only be contested on appeal. Third, the evidence offered is usually "selective" when the defendant does not testify, so that his previous experiences with the law, his knowledge of interrogation procedures and his familiarity with *Miranda* rights are not presented to the jury. *Crane*, 690 S.W.2d at 754; (J.A., 72). When tested against the compelling reasons in this and other cases to allow evidence of the circumstances of the confession, no legitimate state interest in support of the rule announced in *Crane* is evinced.

Examination of the *Crane* rule will be facilitated by a preliminary determination of whether the evidence sought to be adduced at trial is relevant "solely" to the voluntariness of the confession or whether the evidence is relevant to the issue of the confession's credibility and the weight it should be given by the jury. This determination is important to the theory that the excluded evidence was admissible under the multiple admissibility rule which is followed by Kentucky and nearly every other American jurisdiction. However, as will be shown below, in almost all jurisdictions following either the Massachusetts rule or the orthodox doctrine, there is special provision for the presentation to the jury of evidence that obviously bears on voluntariness.¹⁶

¹⁶ See argument beginning at p. 28. Also see the tables found in Appendices A 1-4 of this brief.

Evidence is relevant when it tends, in a logical way, to make some proposition more or less true. Evidence is presented on the hypothesis that it is "to effect rational persuasion." I Wigmore, *Evidence*, § 9, p. 664 (Tillers Rev. 1983); *O'Bryan v. Massey-Ferguson*, Ky., 413 S.W.2d 891, 893 (1967). Where presentation of certain information to a jury may allow it to reach a reasonable conclusion as to the occurrence of an event or a state of mind, then that information is deemed relevant.¹⁷ It is patent that the excluded evidence would provide at least a partial basis on which the jury could bottom a decision to disbelieve the confession. This is true not because the evidence would raise questions of voluntariness alone, but rather, because the evidence could provide a premise from which to conclude that the petitioner willingly told the police what they wanted to hear. Any number of reasons can prompt a confession. A tendency to confess falsely for personal psychological reasons has been recognized. A defendant may confess to things that he knows about but which he has not done. Comment: *Corroborating False Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 Wis. L. Rev. 1121. It is not unlikely that a suspect would take the great interest shown in him by police as a cue to fabricate a story to impress the police with his exploits. Equally likely is the situation in which the accused of his own misinformation believes that he is required to cooperate with the police to avoid trouble and simply agrees with what is suggested.¹⁸ In any event, there is in this case a use for the excluded evidence that is relevant to the issue of whether and why Major Crane made his confession to the police and whether the jury should believe that he did the things he claimed to have done. Because this

¹⁷ The Court need not consider at this point whether the evidence is necessarily admissible. The only question at this point is whether the excluded evidence in this case would tend to aid the jury in its decision as to the believability of the petitioner's confession.

¹⁸ Petitioner apparently did so in this case. (J.A., 4, 9). For another example of the second situation see Mayer, "The Murder Dreams," Vol. 49, No. 1, *Vanity Fair*, p. 82, January, 1986.

evidence is relevant to the credibility of the confession, it was admissible under the multiple admissibility rule.

The rule of multiple admissibility is universally recognized:

[W]hen an evidentiary fact is offered for one purpose and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity. This doctrine, though involving certain risks, is indispensable as a practical rule. I Wigmore, *Evidence*, § 13, p. 694 (Tillers Rev. 1983).

Wigmore's treatise states that "it is uniformly conceded that the instruction of the court suffices" to avoid the risk of misuse of the evidence so admitted. I Wigmore, *Evidence*, § 13, p. 697 (Tillers Rev. 1983). The rule of multiple admissibility is subject only to the general rule that the trial judge may exclude evidence if he determines that the evidence is unfairly prejudicial, will confuse the issues or waste the court's time. Fed. R. Evid. 403; Weinstein, *Federal Rules of Evidence*, § 403, p. 403-1; McCormick, *Evidence*, 2 Ed., § 185, p. 438-441 (1972); I Wigmore, *Evidence*, § 10a, p. 674 (Tillers Rev., 1983). However, the term "prejudice" as used here has a particular meaning. The term does not denote only damage to the adversary's case. Rather,

[w]hat is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one. McCormick, *Evidence*, 2 Ed., § 185, p. 439 n. 31.

Thus, in the present case, unless the admission of the circumstances concerning the taking of the confession tended to unfairly prejudice the prosecutor's case, confuse the issues or waste the court's time, the excluded evidence was admissible. The Court will note that justifications for exclusion stated in the opinion of the Supreme Court of Kentucky in this case parallel closely the first two reasons for which evidence can be excluded. Therefore, determination of whether the excluded evidence would have prejudiced or confused the jury may be made at the same time the Kentucky Supreme Court's justifications are tested against this Court's precedents and compared

to other jurisdictions. The third reason posited by the Kentucky Supreme Court will be considered separately.

At this point, it bears noting that the law of the Commonwealth of Kentucky has conformed to the principles just set out. Although the principle is cited most often in connection with "other crimes" evidence, *Gall v. Commonwealth*, Ky., 607 S.W.2d 97, 106 (1980); *Jones v. Commonwealth*, Ky., 554 S.W.2d 363, 366-368 (1977), it has been used in a number of other contexts. *Cassidy v. Berkovitz*, 169 Ky. 785, 185 S.W. 129 (1916); Lawson, *Kentucky Evidence Law Handbook*, 2 Ed., § 1.10(A) (1984). The Supreme Court of Kentucky also subscribes to the belief that the admonition or instruction of the trial court will channel evidence admitted for a limited purpose to that purpose alone. *Commonwealth v. Richardson*, Ky., 674 S.W.2d 515 (1984). Therefore, one must look elsewhere for justification of the denial of the petitioner's right to present the circumstances surrounding the procurement of the confession. As shown in the argument that follows, the stated justifications for excluding relevant evidence in this case are not sufficient when compared with the compelling reasons for introduction of this evidence.

According to the opinion in *Crane v. Commonwealth*, Kentucky has adopted the orthodox rule by promulgation (by the Supreme Court of Kentucky) of Ky. R. Crim. Proc. (R.Cr.) 9.78. *Crane*, 690 S.W.2d at 754; (J.A. 70). The essence of the orthodox rule, according to that court, is that the trial judge alone shall determine the voluntariness of the statement sought to be excluded. Once voluntariness is determined, the "several states are left to their own procedure as long as adequate safeguards are prescribed." *Crane*, 690 S.W.2d at 754; (J.A. 70). The Kentucky Supreme Court held that *Jackson v. Denno*, 378 U.S. 368 (1964) and *Lego v. Twomey*, 404 U.S. 477 (1972), require no more. *Crane*, 690 S.W.2d at 754; (J.A. 70).¹⁹ The operation of the orthodox rule after determination of voluntariness, according to the Kentucky court, is that "in

¹⁹ This Court's conception of the orthodox rule is set out in *Jackson v. Denno*, 378 U.S. at 386 n.13.

some cases" the jury is permitted to hear the same evidence not for the purpose of redetermining voluntariness but rather only for the purpose of credibility. The opinion states that this Court has acknowledged that the separation of the evidence for purposes of voluntariness and credibility is difficult. *Id.* 690 S.W.2d at 754; (J.A. 71). This portion of the opinion demonstrates the Kentucky Supreme Court's misperception of the prior holdings of this Court and the operation of the orthodox rule.

In *Lego v. Twomey*, 404 U.S. 477 (1972) and in *Spencer v. Texas*, 385 U.S. 554 (1967), the Court explained the motives behind the decision in *Jackson v. Denno*:

It is true that the Court in *Jackson* supported its holding by reasoning that a general jury verdict was not a 'reliable' vehicle for determining the issue of *voluntariness* (emphasis added) because jurors might have difficulty in separating the issues of voluntariness from that of guilt or innocence. But the emphasis there was on the protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to insure that an involuntary confession was not in fact relied upon by the jury. *Spencer*, 385 U.S. at 565.

The Court in *Lego v. Twomey*, further explained that its decision in *Jackson*:

[w]as not based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence. That case was not aimed at reducing the possibility of convicting innocent men.

Quite the contrary, we feared that the reliability and truthfulness of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness.

* * *

Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury *any evidence* (emphasis added) relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circum-

stances that attend the taking of his confession, including facts bearing on its weight and voluntariness. 404 U.S. at 485-486.

It therefore appears that the *Crane* opinion misstates the previous holdings of this Court with respect to the separation of voluntariness and credibility. The Court has never doubted the ability of the jury to reach a proper result as to believability and weight of a confession. The only fear expressed was the reverse situation, that the credibility of a confession would cloud the determination of voluntariness, a matter of federal constitutional law. To this extent, therefore, the opinion in *Crane* erroneously construes this Court's prior decisions.

The *Crane* opinion also erroneously described the operation of the orthodox rule. It stated that after the determination of voluntariness, the jury "in some cases" is permitted to hear the same evidence that was used in the determination of voluntariness. 690 S.W.2d at 754; (J.A. 71). Examination of the decisions and statutes of the jurisdictions which follow the orthodox rule shows that evidence surrounding the circumstances under which a confession is obtained is, as a matter of course, admitted.²⁰ The petitioner has found that in twenty-six (26) of the thirty-three (33) jurisdictions which have recent appellate decisions, statutes or court rules adhering to the orthodox rule, after the trial court decides to admit the confession,

[T]he jurors may then accord it whatever weight and credibility they deem proper, taking into account the circumstances under which it was made. *Beaver v. State*, 455 So.2d 253, 256 (Ala. Cr. App., 1984). See Appendix A(1), p. 2a.

In federal courts, of course, the admissibility of confessions appears to be determined under the orthodox rule. 18 U.S.C. § 3501(a); Fed. R. Evid. 104(a)(e). The statute allows the jury

²⁰ Of course, in those jurisdictions following the Massachusetts rule, all evidence is admitted because the jury is allowed to make a second determination of voluntariness. See Appendix A(4), p. 3a. Eighteen (18) states employ the Massachusetts rule.

to consider evidence of voluntariness but requires the trial judge to instruct the jury to give such weight to the evidence as it feels necessary "under all the circumstances." The evidence rule preserves the right of a party "to introduce before the jury evidence relevant to weight or credibility." Fed. R. Evid. 104(3). Since *Jackson v. Denno* was decided in 1964, thirty-five (35) states have adopted statutes or rules of evidence that are essentially the same as Fed. R. Evid. 104. (See Appendix B, pp. 4a-9a). With the exception of New York, which enacted a rule embodying the Massachusetts rule, [11A McKinney's Cons. Laws, Criminal Procedure Law, § 710.70(3), p. 1970)], all statutes preserve the right of the defendant to present evidence that relates to the weight and credibility of the confession. (See Appendix B, pp. 4a-9a). It therefore appears that the *Crane* opinion is in error when it states that only in "some" cases the jury is allowed to hear evidence that bears on voluntariness. This error vitiates the contention that the "dangers" in admitting evidence of the circumstances under which the confession was obtained justified exclusion of that type of evidence in this case. *Id.* 690 S.W.2d at 755; (J.A. 71). This Court has never held that the difficulty in separating voluntariness and credibility reflected on the ability of the jury to discharge its factfinding duties. The experience of other jurisdictions around the country belies any such difficulty. The eighteen (18) jurisdictions employing the Massachusetts rule obviously do not fear improper handling of the evidence by the jury. They entrust a redetermination of voluntariness to the jury. (See Appendix A4, p. 3a). The twenty-six (26) orthodox states in whose precedents are found specific authorizations to adduce evidence before the jury of the circumstances attendant to the taking of a confession, clearly do not fear undue prejudice to the prosecution or confusion of the issues. (See Appendix A1, p. 2a). In federal courts, 18 U.S.C. § 3501(a) directs the courts to permit the jury to hear relevant evidence concerning voluntariness. In the absence of any showing that juries in Kentucky are less able to deal with evidence concerning the taking of a confession than juries in other jurisdictions, the "dangers" perceived by the *Crane* opinion must be dismissed as chimerical. These are not the legitimate interests necessary to

justify abridgement of the petitioner's right to put on a defense and to cross-examine witnesses. The excluded evidence was relevant to credibility and weight, and under the multiple admissibility rule it was admissible. The evidence should have been admitted because it is for the jury, not the trial judge, to determine the weight to be given a confession in determining guilt. Because it is conceivable that a voluntary confession may be untrue, "the defendant must be allowed to tell the jury why he made it." *Palmes v. State*, 397 So.2d 648, 654 (Fla., 1981); *State v. Vaughn*, 171 Conn. 454, 370 A.2d 1002, 1005 (1976); *Wilson v. State*, 451 So.2d 724, 726 (Miss., 1984). And because a criminal defendant is entitled to a trial by jury, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), the Court must take care that this important federal right to determination of guilt by a jury is not sacrificed in order to secure the petitioner's right to a separate determination of the voluntariness of his confession.

The third reason put forth by the Kentucky Supreme Court to justify the *Crane* rule is that "the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with *Miranda* rights, etc., are excluded." *Crane*, 690 S.W.2d at 755; (J.A. 72). This perceived danger is unlikely to occur in any case. If by cross-examination the defendant would create an inference that he was inexperienced and unfamiliar with the criminal justice system, a competent and properly prepared prosecutor could by redirect examination or presentation of another witness rebut this inference. It is very unlikely that the police or the prosecutor would charge and prosecute a felony case of any importance without obtaining a complete history of the accused from local files and the National Crime Information Center. And, under Kentucky practice, any testifying defendant who has been convicted of a felony may have his credibility "impeached" by requiring him to admit in front of the jury the existence of the conviction. *Commonwealth v. Richardson*, Ky., 674 S.W.2d 515, 517-518 (1984). Thus, whether the defendant testifies or not, the prosecutor will be able to dispel any false impressions as to the inexperience of the defendant. Certainly if the defendant creates through cross-examination a false impression, the

prosecutor can introduce contradictory evidence. Under the multiple admissibility rule, evidence of prior convictions (which are commenced by arrest and perhaps by questioning) would be admissible to contradict the impression raised. In any event, as is shown in this case, the prosecutor often does not wait for provocation to introduce evidence concerning the confession. Here, Detective Branham, on direct examination twice mentioned that he advised Major Crane of his *Miranda* rights. (J.A. 31-32). The second reference was a detailed recitation of the rights and how they were explained. (J.A. 32). Later, Detective Burbrink, on direct examination by the prosecutor, advised the jury that during the course of the confession, the police had been getting the petitioner soft drinks and other things. (TE II 45). The obvious implication of course was that the petitioner had been thoroughly advised before and well-treated during the taking of the statement. The petitioner was not allowed to elicit testimony from these witnesses to show the conditions that existed while the statement was being given and how those conditions might have affected the veracity of his statements and the weight the jury should give them. This perceived fear of the Kentucky Supreme Court is groundless. If the prosecutor can show the circumstances under which the confession was obtained, the same right should be given to the defendant.

As this Court held in *Chambers v. Mississippi*, the state cannot interfere with a defendant's right to defend himself and to confront those witnesses who are damaging his case unless a legitimate state interest justifies this interference. No such interest is shown in this case. Therefore, the Court must conclude that denial of the petitioner's attempt to show the jury the circumstances attending the procurement of his confession was error that violated his rights under the Sixth and Fourteenth Amendments.

III

THE CRANE RULE ALLOWS THE TRIAL JUDGE TO USURP THE FUNCTION OF THE JURY AND, WITHOUT ADVANCING ANY LEGITIMATE STATE INTEREST, INSULATES CERTAIN EVIDENCE FROM BEING CONSIDERED BY THE JURY AND THEREBY INFRINGES UPON RIGHTS GUARANTEED BY THE SIXTH AMENDMENT.

A direct result of the rule enunciated by the Kentucky Supreme Court herein is that it creates a substantial distinction in the manner in which the jury fulfills its role as factfinder relative to confessions vis-a-vis other evidence deemed admissible following a suppression hearing. The distinction is an artificial one that leads to absurd results.

Suppression hearings necessarily require the presiding judge to assume a dual role. He or she must rule on a legal question that depends on the facts for its resolution. The judge is inevitably required to make findings of fact, or to at least find a particular version of the facts credible, in order to support his or her ruling on the question of law.²¹ This proposition is true regardless of whether the evidence sought to be suppressed is a confession, an identification or a tangible item. To the extent that questions of law and questions of fact necessarily overlap regardless of the nature of the evidence sought to be suppressed, there is no logical basis upon which to treat confessions differently from other evidence in terms of ultimately submitting the evidence to the jury. Yet, this is precisely the effect of the rule Kentucky has adopted.

To illustrate the point, in the context of the Fourth Amendment, let it be assumed that a Kentucky police officer, acting on an informant's tip, frisked the defendant, a convicted felon, who was seated in a car and found a pistol in his coat pocket.

²¹ "Of course, so-called facts and their constitutional significance may be so blended that they cannot be severed in consideration. And in any event, there must be a foundation in fact for the legal result." *Rogers v. Richmond*, 365 U.S. 534, 546 (1961).

The defendant is arrested and charged with possession of a handgun by a convicted felon.²² A search incident to that arrest uncovers heroin on the defendant's person.²³

On the ground that he was subjected to an illegal search and seizure, the defendant seeks to suppress the gun and the heroin. After a hearing, conducted pursuant to RCr 9.78, the Kentucky trial court overrules the motion to suppress and allows the evidence to be admitted at trial. In reaching the Fourth Amendment issue, the trial judge necessarily makes a finding of fact that the gun and the heroin were in the defendant's possession. If the theory of the defense was that the defendant was not in possession of either the gun or the heroin, then application of the *Crane* rule, as enunciated by the Kentucky Supreme Court, would effectively preclude the defense from presenting that theory to the jury because the factual findings of the trial judge in the suppression hearing are conclusive. *Crane v. Commonwealth*, 690 S.W.2d at 755; (J.A. 71-72). That is, of course, an absurd result, but one that is engendered by the rationale underlying *Crane*. Such an anomalous situation would not be limited to cases raising Fourth Amendment issues, but would inevitably encompass any evidentiary matter for which suppression is sought, for example, a photographic identification of the defendant.

Due process of law forbids law enforcement authorities from employing identification procedures which are unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).²⁴ "[R]eliability is the linchpin in determining the admissibility of identification testimony . . ." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). Reliability is determined by weighing the *Neil v. Biggers* fac-

²² KRS 527.040(1) and (2); KRS 532.020(1)(a).

²³ See generally *Adams v. Williams*, 407 U.S. 143 (1972).

²⁴ See also *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *Foster v. California*, 394 U.S. 440, 442 (1969); *Simmons v. United States*, 390 U.S. 377, 383 (1968).

tors²⁵ against the corrupting effect of the suggestive identification. *Manson*, 432 U.S. at 114. Thus, if a defendant moves to suppress pre-trial identification evidence, the trial judge in determining the admissibility of the evidence must necessarily consider the facts adduced at the suppression hearing and make a finding relative to them.

Although "[t]he reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case, is a matter for the jury . . .,"²⁶ application of the *Crane* rule totally divests the jury of its role as factfinder. As in determining the voluntariness of a confession, the trial judge when deciding the admissibility of identification evidence must make a finding of fact in order to support his legal conclusion. Surely a defendant's Sixth Amendment rights would be nullified if he were not permitted at trial to challenge the reliability of eyewitness testimony and any police procedures utilized in making the identification. But that is precisely the result produced by the *Crane* rule which would make the factual findings of the trial judge conclusive and binding on the jury. The constitutional infirmities in such a rule are readily apparent. The defendant is provided no opportunity to challenge the evidence or even have it considered by the jury.

The *Crane* rule puts those facts pertinent to the issue of a confession's voluntariness outside the parameters of the jury's function. There is neither any logical basis nor legal justification for treating confessions differently from other evidence which the defendant seeks to suppress. "[T]he proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform." *Watkins v. Sowders*, 449 U.S. 341, 347 (1981). The Court noted that in cases involving identification evidence, "the *only* duty of a jury . . . will often be to assess the reliability of that evidence." *Id.* at 347 (emphasis added). The same conclusion is equally true in cases involving confessions. If the jury is required to determine the weight, credibility and reliability to be given a

²⁵ 409 U.S. at 199-200.

²⁶ *Foster v. California*, 394 U.S. 440, 442 n.2 (1969).

defendant's confession,²⁷ how can that function be fulfilled if facts pertinent to procurement of the confession are deemed beyond the scope of a jury's role and therefore not disclosed to it?

As a practical matter, "There is no articulable distinction between evidence relative to voluntariness and evidence relative to credibility." *Crane v. Commonwealth*, 690 S.W.2d at 755 (Leibson, J., dissenting); (J.A. 73). How can it be found that evidence pertaining to the number of police officers interrogating a 16 year old boy, (who functions at the level of a third or fourth grade child, Supp. TE 36-37), the duration of the interrogation and the size of the interrogation room relates solely to the "voluntariness" of the confession and must therefore be excluded from submission to the jury? Yet, that is precisely the conclusion reached by the Kentucky Supreme Court herein. *Crane* at 754; (J.A. 69, 71). Logic dictates that the foregoing evidence lends itself to a determination of the confession's reliability just as much as any particular statements in the confession that are not borne out by the true facts of the case. Indeed, the very facts excluded herein were of critical importance to the theory of the defense because they provided the jury with a framework of reference as to how the confession was obtained. Those facts constituted a predicate for explaining to the jury why the confession lacked credibility and reliability.²⁸

²⁷ *Lego v. Twomey*, 404 U.S. at 485-486; *Crane v. Commonwealth*, 690 S.W.2d at 755.

²⁸ The error cannot be deemed harmless beyond a reasonable doubt. *Chapman v. California*, 368 U.S. 18 (1967). The theory of the defense here was that the petitioner's confession was unreliable and unbelievable. Yet, the jury is required to consider that defense without being apprised of the circumstances surrounding the procurement of the confession. The defense presented by the petitioner is, in effect, nullified because it cannot reasonably be expected that jurors would reach the conclusion that the confession was untrustworthy without being able to consider the specific facts upon which that conclusion was premised.

Even if it were possible to classify evidence as pertaining exclusively to the issue of voluntariness, no legitimate interest is served by insulating juries from considering it. In *Watkins v. Sowders*, it was observed that, "The Court in *Jackson* [v. *Denno*] did reject the usual presumption that a jury can be relied upon to determine issues according to the trial judge's instructions, but the Court did so because of the peculiar problems the issue of the voluntariness of a confession presents." *Id.* 449 U.S. at 347. In essence, the problem was that in the course of determining a defendant's guilt or innocence, the jury "may find it difficult to understand the policy forbidding reliance on a coerced, but true, confession. . . . Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the [jury's] implicit findings become suspect." *Watkins v. Sowders*, 449 U.S. at 347 (quoting *Jackson v. Denno*, 378 U.S. at 382). See also *Lego v. Twomey*, 404 U.S. at 483. The problem has become obviated with adoption of the *Jackson* rule which requires that a defendant who challenges the admissibility of a confession, receive a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined. *Id.* 378 at 380.²⁹

The Court's concern in *Jackson* with the manner in which the voluntariness of a confession was determined does not, however, reflect a belief that proper resolution of the issue lies beyond the jury's capabilities. Indeed, that some eighteen (18) states³⁰ have adopted the Massachusetts procedure, under

²⁹ *Jackson*, it must be remembered, dealt only with the constitutional infirmity of the New York procedure governing the determination of the voluntariness of a confession. The Court did not find it necessary to address the constitutionality of the Massachusetts procedure. However, in light of the rule enunciated in *Jackson*, the orthodox and Massachusetts procedures upon which the voluntariness of a confession is determined would presumably pass constitutional muster. *Jackson* at 378 n.8.

³⁰ See Appendix A(4) to Petitioner's Brief. Indeed, as demonstrated in Appendices A(1) and B (see pp. 2a-9a), twenty-six (26) states and the federal courts adhere to the orthodox rule but allow the jury to consider as evidence the circumstances surrounding the procurement of a confession or its voluntariness.

which the jury passes on the voluntariness only after the judge has fully and independently resolved the issue against the accused,³¹ suggests that precisely the opposite conclusion is true. See *Jackson*, 378 U.S. at 378 n.8. There is no constitutional reason why a jury cannot consider whether a confession is voluntary even after the trial court has made a threshold determination that the confession is voluntary and therefore admissible. Indeed, to preclude a jury from deciding that issue violates a defendant's Sixth Amendment rights to have a trial by jury, present a defense, and confront and cross-examine his accusers. The fundamental distinction between a suppression hearing and a trial provides strong support for the petitioner's argument that the Sixth and Fourteenth Amendments are violated by a rule of law that precludes a defendant from submitting to the jury the issue of the voluntariness of his confession.

Vastly different purposes are served by the suppression hearing and the trial. Indeed, the Court has recognized that "the interests at stake in a suppression hearing are of a lesser magnitude than those in a criminal trial itself." *United States v. Raddatz*, 447 U.S. 667, 679 (1980). The inherent distinctions led the Court to "conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." *Id.* Nowhere is the distinction more graphic than in the burden of proof respectively governing suppression hearings and trials.

The initial determination that a confession is voluntary is made on the preponderance of the evidence standard. Once that standard has been met, the confession can be admitted into evidence. *Lego v. Twomey*, 404 U.S. at 489. At trial, the prosecution is, of course, held to the standard of proving guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The difference in the standard of proof is especially significant in resolving the issue presented by the case at bar. The proof by which the prosecution hopes to prove guilt is measured by the more stringent reasonable doubt standard.

³¹ *Jackson v. Denno*, 378 U.S. at 378.

How can any evidence of a defendant's guilt which is offered at trial be exempted from the jury's application of the reasonable doubt standard? That is, however, the effect of the *Crane* rule. The Kentucky Supreme Court held that a trial judge's determination on the issue of a confession's voluntariness is conclusive and binding on a jury. *Crane*, 690 S.W.2d at 755; (J.A. 71-72). The ruling thus insulates the issue of voluntariness from application of the reasonable doubt standard by the jury at trial and therefore violates the Due Process Clause of the Fourteenth Amendment. Moreover, the *Crane* rule nullifies a defendant's Sixth Amendment right to trial by jury because the jury is not permitted to make its own independent examination of *all* the evidence. The *Crane* rule allows the trial judge to usurp the jury's function as factfinder on the issue of a confession's voluntariness and at the same time preclude evidence surrounding procurement of the confession from being subjected to the reasonable doubt standard. The result is patently unconstitutional. This court clearly did not intend that the Constitution be interpreted in a manner that would allow evidence pertaining to the procurement of a confession to be put beyond consideration of the jury. This point was made unequivocally by the Court in *Lego*, 404 U.S. at 485-486:

Nothing in *Jackson* [v. *Denno*] questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness (emphasis added).

As shown above, Kentucky has adopted a law that treats confessions differently from all other evidence which is submitted to a jury. There is no legitimate purpose served by such a rule. It creates an artificial distinction between the use of confessions as evidence and other forms of tangible and testimonial evidence. That distinction has no basis in logic or constitutional precedent. Application of the *Crane* rule results in violations of the rights guaranteed a defendant by the Sixth

and Fourteenth Amendments.

IV

THE CRANE RULE IS BASED ON THE FLAWED PREMISE THAT EVIDENCE CAN BE CATEGORIZED AS RELATING EXCLUSIVELY TO EITHER VOLUNTARINESS OR WEIGHT AND CREDIBILITY. THE RULE IS UNCONSTITUTIONAL BECAUSE IT REQUIRES THE DEFENDANT TO CHOOSE BETWEEN THE EXERCISE OF INDIVIDUAL CONSTITUTIONAL RIGHTS.

Resolution of the issue presented in the case at bar reflects the need for a definitive statement of law from the Court especially in light of the multitude of constitutional rights involved. Here, the petitioner was precluded from submitting certain facts surrounding the procurement of his confession to the jury.³² The rationale underlying such a restriction was that the evidence sought to be introduced by the petitioner was relevant only to the question of the voluntariness of his statement. *Crane v. Commonwealth*, 690 S.W.2d at 755; (J.A. 71). However, evidence deemed relevant to the "authenticity, reliability or credibility of the confession" could be presented at trial and submitted to the jury. *Id.* at 755; (J.A. 72).³³

³² Evidence that was ruled inadmissible at trial was placed in the record by avowal. The evidence included: 1) the length and duration of the petitioner's interrogation, 2) the absence of any of petitioner's family members or social workers from the interrogation, 3) the size of the interrogation room and its lack of windows, and 4) the number of police officers present. (J.A. 46-47, 49-50, 69).

³³ The petitioner was allowed to introduce into evidence factual matters in the confession that were not substantiated by the evidence. Into this category came evidence "that the confession contained a misdescription of the weapon used in the homicide; that it spoke of a burglar alarm when there was none; that it told of taking money from a cash drawer when none was taken, and spoke of a gun being fired which had not been fired." *Crane, Id.* at 755; (J.A. 71).

Notwithstanding the efforts of the Kentucky Supreme Court to neatly classify evidence as being related either to a confession's voluntariness or its credibility and reliability, the issue in the case at bar is not one that lends itself to resolution by means of a "bright line" approach. The dissenting justice in the Kentucky Supreme Court was absolutely correct in his observation that:

There is no articulable distinction between evidence relevant to voluntariness and evidence relevant to credibility. Evidence that a confession was coerced, of physical or psychological intimidation surrounding the taking of the confession, is relevant to its credibility. It bears on its truthfulness.

Crane, Id. at 755 (Leibson, J., dissenting); (J.A. 73).³⁴ There is no logical or pragmatic basis upon which to categorize evidence as being exclusively bearing on a confession's voluntariness or reliability. Evidence as to either point must necessarily overlap.

Even if it were possible to classify evidence as pertaining only to a confession's voluntariness or its reliability, there is no reason to believe that a jury is incapable of fulfilling its role as factfinder on the subject of confessions as opposed to any other evidence. The jury does not determine the admissibility of the confession. What it does do is weigh "the contradictory evidence and inferences and draws the ultimate conclusion as to the facts." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 700-701 (1962). Whether a jurisdiction adheres to either the orthodox or Massachusetts procedure governing the admissibility of confessions, the trial judge's

³⁴ See also *United States v. Bear Killer*, 534 F.2d 1253, 1258 (8th Cir. 1976), wherein the court noted, "The presence of duress in the procurement of in-custody statements is clearly relevant to their reliability." Citing *Lego v. Twomey*, 404 U.S. at 484-486. The Eighth Circuit's conclusion was based on the premise that exclusion of any evidence surrounding the taking of a confession makes impossible "the fulfillment of a jury's duty to give the statements such weight as they deserve under all the circumstances." *Bear Killer*, 534 F.2d at 1258.

independent determination as to a confession's admissibility obviates the danger that such evidence might be misused by the jury.

The right to trial by jury guarantees a defendant that the question of guilt or innocence will be decided by his peers. The right cannot be effectuated if certain evidence is not submitted to the jury. For similar reasons, the right to confrontation and cross-examination is nullified because the trial judge's ruling on the voluntariness of a confession puts that subject "off limits" as far as being challenged by the defense through questioning the interrogating police officers.³⁵ Moreover, the right to present a defense is substantially impaired where, as here, a defendant is denied the opportunity to fully contest the credibility and reliability of the principal piece of evidence upon which the prosecution seeks to obtain a conviction.

The constitutional infirmities of the *Crane* rule are not limited to the Sixth Amendment violations delineated above. The infirmities likewise reach the Due Process Clause of the Fourteenth Amendment. "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession . . ." *Jackson v. Denno*, 378 U.S. at 376 [citing *Rogers v. Richmond*, 365 U.S. 534 (1961)]. See also, *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). The due process clause also requires that the prosecution prove a defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. Application of the *Crane* rule precludes a jury from considering those facts surrounding the voluntariness of a confession.³⁶ Thus, evi-

³⁵ As the Court has noted, "[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth," *Watkins v. Sowders*, 449 U.S. at 349 (footnote omitted). The unjustifiable limitation placed on cross-examination by the *Crane* rule unquestionably undermines the search for the truth.

³⁶ The petitioner maintains that evidence ostensibly supporting the voluntariness of a confession is indistinguishable from evidence relating to the confession's credibility and reliability. For that reason, any evidence pertinent to the procurement of the confession must be submitted to the jury if it is to properly fulfill its role as the ultimate factfinder.

dence germane to the guilt or innocence of the defendant is placed beyond the purview of the jury's traditional role as arbiter of the facts and, as a consequence, becomes insulated from application of the reasonable doubt standard. That result is patently unconstitutional because there is no justification for allowing any evidence of guilt to escape the scrutiny of the reasonable doubt standard.

An additional consideration that warrants rejection of the *Crane* rule is that it forces a defendant to choose between the exercise of his individual constitutional rights. The problem manifests itself in two ways, one of which involves rights guaranteed by the Fifth, Sixth and Fourteenth Amendments.

One of the premises upon which the Kentucky Supreme Court anchored the *Crane* rule was its perception of several "dangers inherent in admitting evidence before the jury concerning the circumstances attendant to taking the confession . . ." *Crane*, 690 S.W.2d at 755; (J.A. 71). A perceived danger was that "the evidence offered is usually selective when the defendant fails to take the stand, so his previous experiences with the law, his knowledge of interrogating procedures, his familiarity with *Miranda* rights, etc., are excluded." *Id.* at 755; (J.A. 72). The court's perception of the "danger" in admitting evidence relating to the circumstances by which a confession is obtained is groundless and causes a defendant to be penalized for the exercise of his Fifth Amendment right not to testify. By exercising his Fifth Amendment right at trial, the defendant is precluded from challenging the voluntariness of his confession. He is effectively stripped of his right to confront witnesses and present a defense. No legitimate interest of the state exists which would justify extracting such a severe penalty for the exercise of a defendant's constitutional right not to give testimony at his trial. The prosecution is not hindered or impaired in the presentation of its case simply because the defendant does not testify.

The Kentucky Supreme Court no doubt envisioned a situation where a defendant, by exercising his right not to testify, would mislead the jury or cause it to make unwarranted inferences concerning the circumstances surrounding procure-

ment of the confession. The court's fear, however, will largely go unrealized because the prosecution will presumably spare no effort to present evidence to the jury that a defendant's confession was made voluntarily without coercion and only after scrupulous protection of the defendant's constitutional rights. A defendant who does not testify at trial leaves the state's evidence essentially, if not entirely, un rebutted. In such a situation, the defendant does more to undermine his own case than he does to weaken the prosecution's evidence. If defense counsel is indeed able to utilize cross-examination for the purpose of demonstrating that his client's confession was involuntary and therefore untrustworthy, it would be a simple matter for the prosecutor to negate such a notion through the proper use of rebuttal evidence.

The prosecution suffers no real damage from the defendant's exercise of his Fifth Amendment right in the foregoing situation. The defendant, on the other hand, is forced into a position of having to forego the exercise of his Sixth and Fourteenth Amendment rights because he has exercised one of his Fifth Amendment rights. The dangers perceived by the Kentucky Supreme Court in this situation are more imaginary than real.

The second constitutional dilemma thrust upon the defendant pits the exercise of his Sixth Amendment rights against rights guaranteed him by the Fourteenth Amendment. Under the analysis of the Kentucky Supreme Court, a defendant who seeks to challenge the voluntariness of his confession, must choose between his due process right not to be convicted on the basis of an involuntary confession and the complete exercise of the Sixth Amendment rights enumerated heretofore (especially the right to confrontation and cross-examination). Prohibiting the defendant from submitting to the jury any evidence on the issue of the "voluntariness" of his confession raises numerous violations of rights guaranteed by the Sixth Amendment. The *Crane* rule presumably would allow a defendant, who concedes the admissibility of his confession and does not challenge its voluntariness, pursuant to RCr 9.78, to present in his defense at trial *all* evidence surrounding procurement of the confession. The *Crane* rule thus operates in a

manner designed to force a defendant to choose which of his constitutional rights he will exercise. As in *Simmons v. United States*, 390 U.S. 377, 394 (1968), the Court should "find it intolerable that one constitutional right should have to be surrendered in order to assert another."

Due to the constitutional infirmities underlying the law enunciated by the Kentucky Supreme Court herein, the petitioner respectfully urges the Court to rule that any and all evidence relevant to the procurement of a defendant's confession be submitted to the jury which, in the exercise of its traditional role as arbiter of the facts, is to decide the weight, reliability and credibility to be given said evidence.

CONCLUSION

For the foregoing reasons, the petitioner, Major Crane, respectfully submits that the judgment of the Kentucky Supreme Court should be reversed and remanded with directions to grant a new trial.

Respectfully submitted,

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APPENDICES

APPENDICES

Four categories are used in the tables compiled here. The jurisdictions are divided first into orthodox or Massachusetts rule jurisdictions. The orthodox jurisdictions are further divided according to whether they have specifically held that the circumstances surrounding the taking of a confession are admissible in evidence to give the jury a basis on which to judge the weight and credibility of the confession. Kentucky, of course, has held that circumstances surrounding the taking of a confession are not admissible. Appendix A simply lists the jurisdictions according to the four categories. Appendix B sets out the rules, statutes and precedents on which the categorizations were made. The selection criteria are set out at the end of these Appendices.

APPENDIX A

(1) **Orthodox Rule—Circumstances Admissible**

Federal Courts

Alabama

Alaska

Arizona

California

Connecticut

Florida

Illinois

Indiana

Iowa

Kansas

Louisiana

Maine

Michigan

Minnesota

Mississippi

New Jersey

North Carolina

Ohio

South Dakota

Tennessee

Utah

Virginia

Washington

West Virginia

Wisconsin

(2) **Orthodox Rule—No Specific Ruling**

Arkansas

Delaware

Hawaii

Idaho

Montana

Wyoming

(3) **Orthodox Rule—Circumstances Not Admissible**

Kentucky

(4) **Massachusetts Rule**

Colorado

Georgia

Maryland

Massachusetts

Missouri

Nebraska

Nevada

New Hampshire

New Mexico

New York

North Dakota

Oklahoma

Oregon

Pennsylvania

Rhode Island

South Carolina

Texas

Vermont

APPENDIX B

(1) Orthodox Rule—Circumstances Admissible

Federal Courts	18 U.S.C. § 3501 Fed. R. Evid., Rule 104 <i>United States v. Smith</i> , 638 F.2d 131 (9th Cir., 1981)
Alabama	<i>Beaver v. State</i> , 455 So.2d 253, 256 (Ala. Cr. App., 1984) <i>Malone v. State</i> , 452 So.2d 1386 (Ala. Cr. App., 1984) <i>Ex Parte Singleton</i> , 465 So.2d 443 (Ala. 1985)
Alaska	<i>Stobangh v. State</i> , 614 P.2d 767 (Alas., 1980)
Arizona	17A Ariz. Rev. Stat., Rules of Evidence, Rule 104, p. 7 (1977) <i>State v. Burns</i> , 691 P.2d 297, 301 (Ariz., 1984)
California	29 West Ann. Calif. Codes, Evidence § 406, p. 285 (1965) <i>People v. Carroll</i> , 84 Cal. Rptr. 60, 66 (Cal. App., 1970) <i>People v. Jimenez</i> , 580 P.2d 672 (Cal., 1978) <i>People v. Garcia</i> , 184 Cal. Rptr. 353 (Cal. App., 1982)
Connecticut	<i>State v. Vaughn</i> , 370 A.2d 1002 (Conn., 1976)
Florida	6B Fla. Stat. Ann., § 90-105 (1976) <i>Palmer v. State</i> , 397 So.2d 648 (Fla., 1981)
Illinois	38 Ill. Stat. Ann., Code of Crim. Proc., § 114-11(f), p. 343 (1963) <i>People v. Nicholls</i> , 245 N.E.2d 771 (Ill., 1969)
Indiana	<i>Long v. State</i> , 422 N.E.2d 284, 286 (Ind., 1981)
Iowa	Iowa R. Evid. 104 (1983)
Kansas	4A Kan. Stat. Ann. § 60-408, p. 144 (1964) 2A Kan. Stat. Ann. § 22-3215, p. 486 (1970) <i>State v. Miles</i> , 662 P.2d 1227, 1235 (Kan., 1983) <i>State v. Mzitickeeno</i> , 658 P.2d 1052 (Kan. App. 1983)

Louisiana	<i>State v. Hammler</i> , 312 So.2d 306, 310 (La., 1975)
Maine	Maine R. Evid. 104 (1976) <i>State v. Clark</i> , 475 A.2d 418, 421 (Me., 1984) <i>State v. Curtis</i> , 399 A.2d 1330, 1333 (Me., 1979)
Michigan	Michigan R. Evid. 104 (1978) <i>People v. Spivey</i> , 310 N.W.2d 807 (Mich. App., 1981)
Minnesota	Minn. R. Evid. 104 (1977) <i>State v. Orscanin</i> , 266 N.W.2d 880 (Minn., 1978) <i>State v. Orscanin</i> , 283 N.W.2d 897, 901 (Minn., 1979)
Mississippi	<i>Wilson v. State</i> , 451 So.2d 724, 726 (Miss., 1984)
New Jersey	2A N.J. Stat. Ann., § 84-A-Rules of Evidence 8(3) (1985 pocket part), p. 51 (1976) <i>State v. Hampton</i> , 294 A.2d 23,35 (1972)
North Carolina	N.C. Stat. § 8 C-1, Rule 104 (1985 Repl., 1983) <i>State v. Romero</i> , 286 S.E.2d 903, 905 (N.C. App., 1982) <i>State v. Hinson</i> , 311 S.E.2d 256 (N.C., 1984)
Ohio	8 Baldwin's Ohio Revised Code, Ohio R. Evid. 104, p. 11 (1980) <i>State v. Wilson</i> , 456 N.E.2d 1287, 1292 (Ohio App., 1982) <i>State v. Perry</i> , 237 N.E.2d 891 (Ohio, 1968)

- Tennessee *State v. Pursley*, 550 S.W.2d 949, 950 (Tenn., 1977)
- Utah 9 B Utah Code Ann., 1977 Repl. Volume, pocket part, Rule 104 (1983)
State v. Allen, 505 P.2d 302, 304 (Utah, 1973)
- Virginia *Wilson v. Commonwealth*, 255 S.E.2d 464 (Va., 1979)
- Washington Title 10, Rev. Code Wash. Ann., Cr.R. 3.5, p. 270-271 (1973)
- West Virginia 1A West Va. Code, W. Va. R. Evid. 104, 1985 pocket part, p. 39-40 (1985)
State v. Mason, 249 S.E.2d 793, 798 (W. Va., 1978)
- Wisconsin Wisc. Stat. Ann., Rules of Evidence, § 901.04 (1974)
Turner v. State, 250 N.W.2d 706 (Wis., 1977)

(2) Orthodox Rule—No Specific Ruling

- Arkansas 3A Ark. Stat. Ann., § 28-1001, Rule 104 (1976)
Hall v. State, 634 S.W.2d 115 (Ark., 1982)
- Delaware 16 Del. Code Ann. (1981 Repl. Vol.), Uniform R. Evid. 104, p. 495
Flamer v. State, 490 A.2d 104, 116 (1984)
- Hawaii Haw. Rev. Stat., Ch. 626, Haw. R. Evid. 104, p. 5 (1981)
- Idaho Idaho Rules of Evidence Rule 104, pocket part (effective 1 July 85)
- Montana Mont. R. Evid. 104 (1977)
State v. Smith, 523 P.2d 1395 (Mont., 1974)
State v. Camitsh, 626 P.2d 1250 (Mont., 1981)
- Wyoming Wyo. R. Ev. 104, p. 320 (1978)
- South Dakota 7 South Dakota Codified Laws (1979 Rev.) § 19-9-11 (Rule 104) 1978
State v. Thundershield, 160 N.W.2d 408 (S.D., 1968)

(3) Orthodox Rule—Circumstances Inadmissible

- Kentucky Ky. R. Crim. Proc. 9.78
Crane v. Commonwealth, 690 S.W.2d 753 (Ky., 1985)

(4) Massachusetts Rule

- Colorado 7B Colo. Rev. Stat. (1984 Repl. Vol.) ch. 33, Rule 104, p. 661 (1980)
People v. Salvador, 539 P.2d 1273 (Colo., 1975)
People v. Rex, 689 P.2d 669 (Colo. App., 1984)
- Georgia *State v. Simonton*, 260 S.E.2d 487 (Ga. App., 1979)
State v. Summers, 325 S.E.2d 419 (Ga. App., 1985)
- Maryland *Brittingham v. State*, 492 A.2d 354 (Md. App., 1985)
Bellamy v. State, 435 A.2d 821, 824-825 (Md. Spec. App., 1981)
- Massachusetts *Commonwealth v. Garcia*, 399 N.E.2d 460 (Mass., 1980)
Commonwealth v. Medeiros, 479 N.E.2d 1371, 1382 (Mass., 1985)
- Missouri *State v. Cleveland*, 627 S.W.2d 600 (Mo., 1982)
State v. Gantt, 644 S.W.2d 656 (Mo. App., 1982)
State v. Mitchell, 611 S.W.2d 211, 214 (Mo. Banc., 1981)
- Nebraska 2A Neb. Rev. Stat. (1979 Reissue) § 27-104, p.3 (1975)
State v. Bodtke, 363 N.W.2d 917 (Neb., 1985)
- Nevada 3 Nev. Rev. Stat. 47 100 (1971)
Carlson v. State, 445 P.2d 157, 159 (Nev., 1968)
Laurson v. State, 634 P.2d 1230 (Nev., 1981)
- New Hampshire *State v. Squires*, 48 N.H. 364, 369 (1869)
State v. Reed, 207 A.2d 443, 446 (1965)

- New Mexico N.M.R. Evid. 104 (1973)
State v. Ortega, 419 P.2d 219, 223 (N.M., 1966)
- New York 11A McKinney's Consolidated Laws, Criminal Procedure Law, § 710.70(3), p. 180 (1970)
People v. Graham, 447 N.Y.S.2d 918, 432 N.Ed.2d 790 (N.Y., 1982)
- North Dakota *State v. Skjonsby*, 319 N.W.2d 764, 781 (N.D., 1982)
 5B North Dakota Century Code (Repl. Vol.), 1985 pocket part, p. 173, N.D. R. Evid. 104 (1976)
 N.D. R. Crim. Proc. 17.1
- Oklahoma 12 Okla. Stat. Ann., Evid. Code, § 2105, p. 106-108 (1978)
Bowers v. State, 648 P.2d 835 (Okl.Crim.App., 1982)
Smith v. State, 674 P.2d 569 (Okl.Crim.App., 1984)
- Oregon 1 Ore. Rev. Stat. Ch. 40, Title 4 (1985 Repl.), Evid. Code 40.030, R. 104 (1981)
 1 Ore. Rev. Stat. (1985 Repl.) § 135.37 (1973)
State v. Brewton, 395 P.2d 874 (Ore., 1964)
State v. Allen, 398 P.2d 477 (Ore., 1965)
- Pennsylvania 19 Penn. Cons. Stat. Ann., Pa. R. Crim. Proc. Rule 323(j) (1965)
 West's Rules Pamphlet, 1985 Pa. Rules of Court, Rule 323(j), Comment, p. 759 (1985)
Commonwealth v. Coach, 370 A.2d 358 (Pa., 1977)
- Rhode Island *State v. Bello*, 417 A.2d 902, 904 (R.I., 1980)
State v. Verlaque, 465 A.2d 207 (R.I., 1983)
- South Carolina *State v. Chasteen*, 88 S.E.2d 880 (S.C., 1955)
State v. Cannon, 151 S.E.2d 752, 756 (S.C., 1966)

- Texas 4A Vernon Tex. Stat. Ann., Code Crim. Proc., Art. 38.22, p. 263-264 (1965)
Ross v. State, 504 S.W.2d 862, 864 (Tx. Crim. App., 1974)
- Vermont Vt. Stat. Ann., V. R. Evid. 104, p. 309 (1983)
State v. Harbaugh, 326 A.2d 821 (Vt., 1974)

HOW THE TABLES WERE COMPILED

Since the Court's decision in *Jackson v. Denno* in 1964, thirty-five states have, by statute or court rule, adopted procedures similar to those found in Fed. R. Evid. 104 and 18 U.S.C. § 3501. Reliance on a Rule 104 procedure does not necessarily result in easy identification as an "orthodox" or a "Massachusetts" rule state. Typically, the last subsection of the rule adopted provides that submission of the question of admissibility to the trial judge does not "limit the right of the party to introduce before the jury evidence relevant to weight or credibility." [e.g. Fed. R. Evid. 104(e)]. Reservation of the right of the party to introduce such evidence does not necessarily tell the reader whether a party may introduce evidence of the circumstances under which the confession was obtained as bearing on its weight or credibility. The admissibility of such evidence in those jurisdictions which follow the "Massachusetts" rule is axiomatic. Of course, to the extent that evidence concerning the circumstances surrounding the confession tells the jury something useful about the truthfulness of the confession, such evidence should always be admissible.

In preparing these tables, the petitioner did not place a jurisdiction in either the "Orthodox, Circumstances Admissible" or "Massachusetts" rule categories unless by statute, court rule or appellate decision that jurisdiction has stated positively which rule was to be followed. All authorities cited are the most recent that could be found. Where a statute or court rule states the procedure followed, the petitioner has attempted to include a judicial precedent construing the new procedure. However, since Fed. R. Evid. 104(e) merely preserves current state practice, the petitioner has relied on cases decided before the enactment of the statute or rule in those situations where it is evident that the statute or rule has not changed the state's practice. Primarily, this was done when the state has considered the new statute or rule but has not announced a change in procedure. Where the state has never ruled specifically that circumstances regarding the taking of a

confession are admissible, the petitioner listed the state in subsection (B) of the orthodox rule. In many of these instances there is a strong indication that circumstances are admissible but because there is no positive statement one way or the other, the petitioner has not placed these jurisdictions in either the orthodox or Massachusetts list. Kentucky is the only state found to hold specifically that the circumstances surrounding the taking of a confession are inadmissible and therefore is listed in a third subsection of the orthodox rule.